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Counsel for Defendant Google LLC

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

CHASOM BROWN, *et al.*, individually and
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 4:20-cv-03664-YGR-SVK

**DECLARATION OF DONALD SETH
FORTENBERY IN SUPPORT OF
ADMINISTRATIVE MOTION TO SEAL
PORTIONS OF PLAINTIFFS' RESPONSE
TO GOOGLE'S ADMINISTRATIVE
MOTION (DKT. 810) RE: NEWLY
REVEALED INCOGNITO-DETECTION
BIT**

Judge: Hon. Susan van Keulen, USMJ

Case No. 4:20-cv-03664-YGR-SVK

1 I, Donald Seth Fortenbery, declare as follows:

2 1. I am a member of the bar of the State of Kentucky and an attorney at Quinn Emanuel
3 Urquhart & Sullivan, LLP, attorneys for Defendant Google LLC (“Google”) in this action. I have
4 been admitted pro hac vice in this matter. Dkt. 547. I make this declaration of my own personal,
5 firsthand knowledge, and if called and sworn as a witness, I could and would testify competently
6 thereto.

7 2. I am making this declaration pursuant to Civil Local Rule 79-5(e)-(f) as an attorney
8 for Google as the Designating Party, pursuant to Civil Local Rule 79-5(f)(3) in response to Dkt.
9 815.

10 3. On January 4, 2023, Plaintiffs filed their Administrative Motion to Consider Whether
11 Google’s Materials Should Be Sealed regarding Plaintiffs’ Response to Google’s Administrative
12 Motion (Dkt. 810) Re: Newly Revealed Incognito-Detection Bit. Dkt. 815. On January 4, 2023, I
13 received an unredacted service copy of these documents.

14 4. The common law right of public access to judicial proceedings is not a constitutional
15 right and it is “not absolute.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978); *Crowe v.*
16 *Cty. of San Diego*, 210 F. Supp. 2d 1189, 1194 (S.D. Cal. 2002) (“[T]here is no right of access which
17 attaches to all judicial proceedings.” (internal citations omitted)). The right is weakest where, as
18 here, the proceedings concern a non-dispositive discovery motion; rather than satisfy the more
19 stringent “compelling reasons” standard, a party seeking to seal materials in these circumstances
20 must make only a “particularized showing” of “good cause.” *Kamakana v. City & County of*
21 *Honolulu*, 447 F.3d 1172, 1178–80 (9th Cir. 2006). Such sealing is appropriate when the information
22 at issue constitutes “competitively sensitive information,” such as “confidential research,
23 development, or commercial information.” *France Telecom S.A. v. Marvell Semiconductor Inc.*,
24 2014 WL 4965995, at *4 (N.D. Cal. Oct. 3, 2014); *see also Phillips v. Gen. Motors Corp.*, 307 F.3d
25 1206, 1211 (9th Cir. 2002) (acknowledging courts’ “broad latitude” to “prevent disclosure of
26 materials for many types of information, including, but not limited to, trade secrets or other
27 confidential research, development, or commercial information”); *Standard & Poor’s Corp. Inc. v.*
28 *Commodity Exch., Inc.*, 541 F. Supp. 1273, 1275 (S.D.N.Y. 1982) (“[T]he overriding interest to be

found in business confidences . . . require[s] . . . temporary reasonably restricted access to the Courtroom of members of the public.”).

5. I have reviewed the documents that Plaintiffs seek to file under seal pursuant to Civil Local Rule 79-5(f). Based on my review, there is good cause to seal the following information:

Document(s) to be Sealed	Basis for Sealing
Plaintiffs’ Response to Google’s Administrative Motion (Dkt. 810) Re: Newly Revealed Incognito-Detection Bit Pages 1:3, 2:18, 2:24, 2:27, 3:3-4, 4:4-5, 4:8, 4:14	The information requested to be sealed contains Google’s highly confidential and proprietary information regarding highly sensitive features of Google’s internal systems and operations, including particular data fields and their proprietary functionalities, that Google maintains as confidential in the ordinary course of its business and is not generally known to the public or Google’s competitors. Such confidential and proprietary information reveals Google’s internal strategies, system designs, and business practices for operating and maintaining many of its important services, and falls within the protected scope of the Protective Order entered in this action. <i>See</i> Dkt. 81 at 2-3. Public disclosure of such confidential and proprietary information could place Google at an increased risk of cybersecurity threats, as third parties may seek to use the information to compromise Google’s internal practices relating to competing products.
Exhibit 1 to Mao Declaration Pages 1-2	The information requested to be sealed contains Google’s highly confidential and proprietary information regarding highly sensitive features of Google’s internal systems and operations, including particular data fields and their proprietary functionalities, that Google maintains as confidential in the ordinary course of its business and is not generally known to the public or Google’s competitors. Such confidential and proprietary information reveals Google’s internal strategies, system designs, and business practices for operating and maintaining many of its important services, and falls within the protected scope of the Protective Order entered in this action. <i>See</i> Dkt. 81 at 2-3. Public disclosure of such confidential and proprietary information could place Google at an increased risk of cybersecurity threats, as third parties may seek to use the information to compromise Google’s internal practices relating to competing products.
Exhibit 2 to Mao Declaration PDF Pages 2-3	The information requested to be sealed contains Google’s highly confidential and proprietary information regarding highly sensitive features of Google’s internal systems and operations, including particular data fields and their

	proprietary functionalities that Google maintains as confidential in the ordinary course of its business and is not generally known to the public or Google's competitors. Such confidential and proprietary information reveals Google's internal strategies, system designs, and business practices for operating and maintaining many of its important services, and falls within the protected scope of the Protective Order entered in this action. <i>See</i> Dkt. 81 at 2-3. Public disclosure of such confidential and proprietary information could place Google at an increased risk of cybersecurity threats, as third parties may seek to use the information to compromise Google's internal practices relating to competing products.
Exhibit 3 to Mao Declaration Pages 10:7-8, 149:21, 150:1, 150:12-13, 151:8, 152:4-5, 152:25	The information requested to be sealed contains Google's highly confidential and proprietary information regarding highly sensitive features of Google's internal systems and operations, including a particular internal project, that Google maintains as confidential in the ordinary course of its business and is not generally known to the public or Google's competitors. Such confidential and proprietary information reveals Google's internal strategies and business practices, and falls within the protected scope of the Protective Order entered in this action. <i>See</i> Dkt. 81 at 2-3. Public disclosure of such confidential and proprietary information could place Google at an increased risk of cybersecurity threats, as third parties may seek to use the information to compromise Google's internal practices relating to competing products.

6. Google's request is narrowly tailored in order to protect its confidential, privileged, and protected information. These redactions are limited in scope and volume. Because the proposed redactions are narrowly tailored and limited to portions containing Google's highly-confidential, confidential, or privileged information, Google requests that the portions of the aforementioned documents be redacted from any public version of those documents.

7. Google does not seek to redact or file under seal any of the remaining portions of documents not indicated in the table above.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed in Hoboken, New Jersey on January 11, 2023.

By /s/ Donald Seth Fortenbery

Donald Seth Fortenbery

Attorney for Defendant

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